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FAMILY LAW

by

Eugene L. Smith*

DEVELOPMENTS during the survey period concerning the rights of illegitimate children and their fathers¹ will have great impact on Texas family law. Major changes in the Texas practice are now necessary to accommodate the requirements of cases recently decided by the Supreme Court of the United States. However, these changes are overshadowed by the potential effect of two Texas cases, one recently decided by the Supreme Court² and one pending,³ which have established a court ordained paternity action.

As in the law of matrimonial property and of torts, a significant Texas decision in family law during the survey period was *Graham v. Franco*,⁴ pre-saging as it should the eventual limitation, or abolition, of interspousal immunity in Texas.

Headline news should not be allowed wholly to obscure other noteworthy items. Interesting aspects of the problems of property division upon divorce were given attention⁵ and the rules controlling pre-divorce agreements between the parties were further refined.⁶ Obedience to a court's custody order is made more likely by three cases that expand judicial authority over a recalcitrant, or contumacious, party to a custody proceeding.⁷

I. MARRIAGE AND DIVORCE

Two cases were decided dealing with the effects of a bigamous marriage. In the first,⁸ a couple entered into a ceremonial marriage after the wife had instituted a suit for divorce from her former husband in Mexico. The Mexican divorce suit, however, was never prosecuted to judgment. After the parties had lived together six years, the husband brought suit to have the ceremonial marriage declared void. His wife asked for one-half of the property acquired during the marriage upon the theory that the marriage was putative. The husband contended that she should have no rights to the property as she was the "guilty" party. On appeal from a summary judgment for the husband, the court held that if *either* party believed at the time of the ceremonial marriage that there was no impediment, a putative marriage existed until they both learned of the impediment, and accordingly the wife was entitled to a one-half interest in the property acquired during the existence of the putative marriage.

In the second case,⁹ a couple was ceremonially married on January 23, 1970, at which time the wife was still married to another man. Three months later the wife and her first husband were divorced. On June 30 of the same year,

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¹ See text accompanying notes 44-59 *infra*.

² *Gomez v. Perez*, 41 U.S.L.W. 4174 (U.S. Jan. 17, 1973).

³ *S— v. D—*, 335 F. Supp. 804 (N.D. Tex. 1971), *cert. granted*, 405 U.S. 1064 (1972).

⁴ 488 S.W.2d 390 (Tex. 1972); see text accompanying notes 60-75 *infra*.

⁵ See text accompanying notes 15-16 *infra*.

⁶ See text accompanying notes 17-22 *infra*.

⁷ See text accompanying notes 23-29 *infra*.

⁸ *Dean v. Goldwire*, 480 S.W.2d 494 (Tex. Civ. App.—Waco 1972), *error ref. n.r.e.*

⁹ *Caddel v. Caddel*, 486 S.W.2d 141 (Tex. Civ. App.—Amarillo 1972).

the second husband brought suit for annulment and his wife counter-claimed for divorce. However, in the interim between the marriage and the suit, the woman had discovered that she was pregnant. The issue presented by this somewhat bizarre set of facts was whether the child born during the woman's marriage to her second husband was his legitimate child; *i.e.*, who is legally the father of a child conceived during one marriage and born during a subsequent marriage? In both situations, the child is presumed to be the legitimate child of the man who is the husband at the critical points of conception and birth.¹⁰ Faced with the conflicting presumptions, the court held that the presumption of legitimacy at the time of conception prevails over that of legitimacy at the time of birth, but that the presumption may be rebutted by the testimony of the parties themselves. As a rationale for admitting the testimony of the woman and her second husband, the court pointed out that their testimony could not bastardize the child because the child would be legitimate under either set of facts. It further held that section 2.22 of the Family Code,¹¹ making the second marriage valid on the dissolution of the first marriage, operated to validate the marriage only from the date the impediment was removed.

The court's ruling in the latter case is satisfactory under the circumstances, but can lead to an anomalous result. The fortuitous circumstance of consecutive marriages, with conception in one and birth in another, and the concomitant application of two presumptions of legitimacy, gives only an apparent, not real, reason for permitting the testimony of the parties about the paternity of the child. If there had been no second marriage, neither the woman nor her first husband could have testified about paternity;¹² if there had been no first marriage, neither the woman nor her second husband could have testified about paternity.¹³ In either event the child would have been conclusively presumed to be the legitimate child of the husband.¹⁴ But if the woman were to bring separate suits against each husband for support of the child born during the marriage to the second and conceived during the marriage to the first, all three principals could testify to paternity under the rule of this case. With the real possibility that an issue of fact would be raised in both cases, a finding of non-paternity as to each husband could be the result of such testimony. A better answer to the problem is to abolish Lord Mansfield's rule and allow the husband and wife to testify to the paternity of a child born and conceived during their marriage.

Legal problems associated with divorce were far more common during the past year than those concerning marriage. The ubiquitous argument that post-divorce period payments constitute alimony was raised in a case¹⁵ in which

¹⁰ *Id.* at 145-46; *Burtis v. Weiser*, 195 S.W.2d 841 (Tex. Civ. App.—Beaumont 1946), *error ref.*

¹¹ TEX. FAM. CODE ANN. tit. 1, § 2.22 (Supp. 1972).

¹² *Burtis v. Weiser*, 195 S.W.2d 841 (Tex. Civ. App.—Beaumont 1946), *error ref.*

¹³ C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 90 (1956).

¹⁴ *Id.*

¹⁵ *Marks v. Marks*, 470 S.W.2d 83 (Tex. Civ. App.—Tyler 1971), *error ref. n.r.e.* See also *Republic Nat'l Bank v. Beaird*, 475 S.W.2d 344 (Tex. Civ. App.—Beaumont 1971), *error ref.* In *Lampkin v. Lampkin*, 480 S.W.2d 35 (Tex. Civ. App.—El Paso 1972), a pre-divorce property settlement agreement was held not to be void as against public policy as

the trial court ordered one individual to pay his wife twenty-five percent of his retirement pay because the right to receive the retirement benefits had vested during marriage. Needless to say, the appellate court had no difficulty finding the argument to be without merit, holding that future payments of this sort are not decretal alimony if they are referable to any property of the spouses. Of more importance in the area of property division was a holding that a trial court may order a spouse to pay the other spouse cash in settlement of their marital property rights, even though the estate of the parties did not include any cash.¹⁶ Presumably this court-imposed obligation may be paid over a period of time and secured by a note.

The importance of specificity in court decrees and in property settlement agreements approved by courts was made apparent in *Ex parte Myrick*,¹⁷ in which it was held that a husband's refusal to execute a trust agreement required by his divorce decree was not punishable by contempt because of the vagueness of the obligation created by the order. The husband had entered into a property settlement agreement that was approved by the court in a decree containing the standard boilerplate language: "the parties are ordered to make all payments, deliveries and execute all notes and instruments, to carry this agreement into full force in effect, forthwith."¹⁸ The appellate court refused to allow the trial court to enforce this injunction¹⁹ because the trust agreement contained terms not previously agreed upon by the parties. Thus, the court of appeals decision emphasized the need to work out all terms and conditions of a divorce settlement prior to the time of the final decree.

Two interesting cases were decided in which the res judicata effect of a divorce decree that incorporated a pre-divorce settlement agreement was considered. In the first,²⁰ a wife's attorneys were held bound by a provision of the decree stating that each party would pay his own legal fees, even though the attorneys were not technically parties to the divorce suit. The attorneys contended that their services were "necessaries" and that the husband's obligation to pay these necessities existed independent of any obligation imposed by the judgment, but this contention was rejected. In the second case²¹ the divorce decree contained a standard provision that the husband, who was ordered to pay support, would have the right to claim the two children as dependents for

it was not supportive of divorce even though the wife agreed to cooperate and not contest the pending divorce.

¹⁶ *Weeks v. Weeks*, 471 S.W.2d 454 (Tex. Civ. App.—Beaumont 1971), *error dismissed*.

¹⁷ 474 S.W.2d 767 (Tex. Civ. App.—Houston [1st Dist.] 1971).

¹⁸ *Id.* at 769.

¹⁹ The court characterized the order to carry out the terms of the property settlement agreement as a mandatory injunction, relying on *Ex parte Slavin*, 412 S.W.2d 43 (Tex. 1967).

²⁰ *Mullinax, Wells, Mauzy & Collins v. Dawson*, 478 S.W.2d 121 (Tex. Civ. App.—Dallas 1972), *error ref. n.r.e.*

²¹ *Kolb v. Kolb*, 479 S.W.2d 81 (Tex. Civ. App.—Dallas 1972). The importance of careful draftsmanship in separation and divorce decrees is also made plain in *Miller v. Two Investors, Inc.*, 475 S.W.2d 610 (Tex. Civ. App.—Dallas 1971), *error ref. n.r.e.*, holding that the wife who was given occupancy of a house for a specified period was obligated to pay taxes in the absence of a provision in the divorce decree. As the case likened her interest to the right of a surviving spouse's homestead, presumably she would be further obligated to pay for ordinary repairs and maintenance on the house. Obviously these obligations, and that of insuring the premises, will be covered in any well-drafted agreement or decree.

purposes of income tax deductions.²² In a subsequent proceeding to modify support, the husband's child support obligation was reduced, and the wife moved that the court enter an order entitling her to claim one or both of the children as dependents because of changed circumstances. The court of civil appeals held that the right to claim the children as dependents was independent of the obligation of support, and that the trial court was without power to alter the pre-divorce agreement that was incorporated in the divorce decree. Thus, the husband retained the right to claim the children as dependents. Therefore, a court's continuing jurisdiction to modify child support does not extend to modification of provisions in a court-approved settlement agreement on matters ancillary to the payment of child support.

II. CUSTODY AND SUPPORT

Texas has never adopted a procedure for the effective enforcement of a custody or a visitation order if one parent refuses to recognize the other's rights.²³ If the father does not return a child to the mother after his period of visitation has expired, if the mother refuses to turn a child over to the father for his period of visitation, or if one or the other parent who has no custody rights abducts the child, the only recourse available to the parent with the right to custody of the child is to institute a habeas corpus proceeding. Unfortunately, in Texas such a proceeding invokes the general jurisdiction of the court over the child and is converted into a full-fledged custody dispute, with venue in the county of residence of the parent in violation of the original decree.²⁴ An unfortunate result of these rules is tacitly to encourage the parents to violate decretal custody provisions and take advantage of the venue requirement, and the expense of the ensuing litigation for leverage. Child-snatching by parents is thus rewarded by procedure.

Three cases decided in the survey period, however, limit this practice. In *Gunther v. Gunther*²⁵ the father and mother were divorced in California. Subsequent to the divorce the court entered a custody order in favor of the husband, granted the wife specific visitation rights, and ordered both parents not to take the children out of California without the consent of the other. Shortly after this order was entered the husband secretly left California, taking the children with him. He eventually settled in Texas, after concealing his whereabouts and that of the children for some seven months. When she located her former husband and children, the mother instituted a custody suit. Although the facts did not clearly establish a material change of circumstances

²² The non-custodial parent or the parent having custody of a child for a shorter period is entitled to claim the child as a dependent if the divorce decree or agreement between the parents grants him the deduction and (1) he furnishes at least \$600 to the child or (2) he contributes at least \$1,200 support (regardless of the number of children) and the wife fails to establish clearly that she furnished over half of the total support of the children. INT. REV. CODE OF 1954, § 152(e).

²³ See Smith, *Family Law, Annual Survey of Texas Law*, 22 SW. L.J. 115, 117-23 (1968), for a discussion of this area of the law. See also, e.g., *Ex parte Helle*, 477 S.W.2d 379 (Tex. Civ. App.—Corpus Christi 1972) (mother's suit in second court, followed by her nonsuit, did not give second court jurisdiction of her person for purposes of custody order).

²⁴ *Lahey v. McCarroll*, 134 Tex. 191, 134 S.W.2d 1016 (1940).

²⁵ 478 S.W.2d 821 (Tex. Civ. App.—Houston [14th Dist.] 1972), *error ref. n.r.e.*

since the last valid California custody decree, the trial court awarded custody to the mother, finding that the husband had deliberately secreted the children. The court of civil appeals affirmed, holding without equivocation that the father's action in hiding the children from the mother for seven months warranted a change of custody.

The other two cases both involved dismissal of appeals because of the appellant's failure to comply with a trial court order of custody. In the first case,²⁶ the child's father and paternal grandmother instituted a change of custody proceeding against the mother; the trial court awarded the mother custody. After the appeal was perfected the child was abducted, and neither the appellants nor the child could be located. The reviewing court ordered the return of the child and, upon the failure of the appellants to comply with the order, dismissed the appeal upon the ground that "a party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing her demands while she stands in an attitude of contempt to legal orders and processes of the courts of this State."²⁷ No Texas authority was cited for the decision.

The later case²⁸ is in many respects more remarkable since the appeal from the trial court order of divorce, custody, and division of property concerned *only* the division of property. The trial court had awarded custody to the father and had ordered the mother to deliver the children to him. Instead, the mother fled the jurisdiction, taking the children with her. Nevertheless, she prosecuted her appeal from the property division. Upon the appellee-father's motion to dismiss for failure to comply with the custody order, the reviewing court held that "the mere grace of favor of appellate review may be denied if appellant persists in disobedience of an order related to the one that is the basis of this appeal."²⁹ The court, therefore, issued an order of dismissal conditioned upon the mother's failure to comply with the trial court order of custody.

A perennial problem in custody disputes is that of the judge interviewing a child in chambers out of the presence of the parties and their counsel. Whether the suggestion is made by the judge or by counsel, attorneys are put in an unenviable position. First, they are fearful of alienating the judge by objecting to such an interview, which will be without benefit of record and the effect of which is uncertain. Second, most attorneys in custody disputes want a reasonably correct decision to be reached for the benefit of the child. Given the conflicting claims and evidence in almost all custody disputes an award of custody is seldom reversed on appeal. The present Texas rule is that, absent an objection by the party not awarded custody, any error in a judge's interviewing the child in chambers is waived.³⁰ Such interviews illustrate the curious hybrid nature of the custody proceeding and are, of course, anti-

²⁶ Hopp v. James, 470 S.W.2d 716 (Tex. Civ. App.—San Antonio 1971).

²⁷ *Id.* at 717, citing Tobin v. Casaus, 128 Cal. App. 2d 588, 275 P.2d 792 (1954).

²⁸ Steed v. Woods, 475 S.W.2d 814 (Tex. Civ. App.—Amarillo 1972), *error dismissed*.

²⁹ *Id.* at 816.

³⁰ Ponder v. Rice, 479 S.W.2d 90 (Tex. Civ. App.—Dallas 1972); Bergerac v. Maloney, 478 S.W.2d 111 (Tex. Civ. App.—Beaumont 1972), *error ref. n.r.e.* See also Robinson v. Robinson, 487 S.W.2d 713 (Tex. 1972), in which it was held that a wife was not deprived of due process by an in-chambers interview at which her counsel was present, but which was conducted in her absence and without a record being made; no objection to the proceeding was made by her.

thetical to the adversary process, which is, perhaps, an unsuitable vehicle for determining custody. As the children's preferences are in no event binding on the court, even if the child is above fourteen years of age,³¹ the propriety of the practice is doubtful. It may well give some measure of reassurance to the judge, but the effect upon a parent who thinks his child has chosen between parents, and upon a child who may believe that he is being forced to make such a choice, can be disastrous.

In an interesting venue case,³² the question of whether a district court's custody decree supersedes a county court's appointment of a guardian of the person was raised indirectly. The mother of the child had been awarded custody in the divorce. She subsequently relinquished the child to the child's maternal grandmother, who was appointed the guardian of the person and of the estate of the child by a county court. In reaching a conclusion on the issue of venue in a suit between the mother and grandmother, the court seemed to hold that an award of custody is superior to the appointment of a guardian of the person.

Increasingly, disputes between a parent and strangers over the custody of a child appear in the reports. In a situation in which initial award of custody was made to the grandmother, the father seeking a change of custody was not given the aid of the presumption favoring a natural parent, but was required to show that the best interests of the child and materially changed conditions required a change of custody.³³ However, the criterion apparently used in a contest between grandparents, is that of the best interests of the child.³⁴

Two support cases decided during the survey period were of considerable importance. In *Westphal v. Palmer*³⁵ a couple was divorced in Harris County. The wife was given custody of the child and the father was ordered to make child support payments. Subsequently, the mother moved to Wisconsin. When her former husband became delinquent in his child support payments, she instituted proceedings in Wisconsin under the Revised Uniform Reciprocal Enforcement of Support Act (RURESA).³⁶ After the Wisconsin court determined that the father owed a duty of support, the papers were sent to the same court that rendered the divorce. The father contended that the only remedy available to his former wife in that court was a contempt proceeding. The court of civil appeals held that RURESA created an additional remedy in favor of persons who are owed an obligation of support and, significantly, based its decision in part upon the fact that section 31 of RURESA³⁷ makes available intrastate enforcement as well. As least this one court has now clearly indicated that RURESA, intentionally or not, gives obligees an additional remedy in support cases, whether enforcement is interstate or intrastate.

³¹ *Brooks v. Brooks*, 480 S.W.2d 463 (Tex. Civ. App.—Eastland 1972).

³² *Calbeck v. Bowen*, 475 S.W.2d 607 (Tex. Civ. App.—Tyler 1971).

³³ *Allen v. Salinas*, 483 S.W.2d 289 (Tex. Civ. App.—El Paso 1972).

³⁴ *Flores v. Riveria*, 473 S.W.2d 613 (Tex. Civ. App.—Amarillo 1971), *error ref. n.r.e.*

³⁵ 480 S.W.2d 277 (Tex. Civ. App.—Houston [14th Dist.] 1972). *See also Beck v. Winegart*, 471 S.W.2d 422 (Tex. Civ. App.—Amarillo 1971), holding the provision of RURESA authorizing intrastate enforcement of support obligations to be constitutional even though not mentioned in the caption of the bill, which was descriptive only of "reciprocal enforcement of the duties of support."

³⁶ WIS. STAT. § 52.10 (Supp. 1972) and TEX. REV. CIV. STAT. ANN. art. 2328b-4 (1971).

³⁷ TEX. REV. CIV. STAT. ANN. art. 2328b-4, § 31 (Supp. 1972).

Consistent with this increase of remedies is *Menner v. Ranford*,³⁸ recently decided by the Supreme Court of Texas, which held that arrearages in child support may be the subject of a judgment payable in installments under the court's power to alter, suspend, or modify support orders. Most attorneys and judges formerly assumed that a finding of contempt was the only available remedy. Now a finding that the obligor is in arrears may be supported by a finding of civil contempt, in which event purging of the contempt is possible by periodic payments of the arrearage and suspension of the commitment;³⁹ or a judgment that the contempt will continue as long as the arrearage is unpaid.⁴⁰ The court may also find the arrearage is not the product of contempt and, under *Menner*, "alter" the support obligation by providing for a pay out.

Of more importance to Texas substantive law was the decision of the Supreme Court of the United States in *Gomez v. Perez*.⁴¹ The lower courts had held that the Texas rule denying paternal support to illegitimate children was not violative of equal protection or due process under the fourteenth amendment. In reversing, the Supreme Court said:

[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because her natural father has not married her mother. For a State to do so is illogical and unjust. . . . We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.⁴²

Texas now has an action for paternal support of illegitimate children, regardless of whether any legislative action is taken on the paternity statute proposed by the Family Law Section of the State Bar.⁴³

III. DEPENDENCY AND ADOPTION

For direct and immediate impact on Texas practice in family law, *Stanley v. Illinois*⁴⁴ and its progeny clearly represent the most significant development during the survey period. In *Stanley* the children of an unmarried father were declared dependents without a hearing on parental fitness and without proof of neglect. The Illinois Supreme Court had held that proof of the single fact that the father and mother of the children were not married justified

³⁸ 487 S.W.2d 698 (Tex. 1972).

³⁹ *Ex parte Arapis*, 157 Tex. 627, 306 S.W.2d 884 (1957). Compare *Garcia v. Garcia*, 469 S.W.2d 920 (Tex. Civ. App.—San Antonio 1971), holding such a trial court order to be interlocutory and hence not appealable.

⁴⁰ *Ex parte Hooks*, 415 S.W.2d 166 (Tex. 1967).

⁴¹ 35 L. Ed. 2d 56 (U.S. Jan. 17, 1973). *S. v. D.*, 335 F. Supp. 804 (N.D. Tex. 1971), cert. granted, 405 U.S. 1064 (1972), upheld Texas criminal nonsupport statutes even though they do not require support from fathers of illegitimate children; this case will be decided shortly as oral arguments in it were consolidated with those in *Gomez*.

⁴² 35 L. Ed. 2d at 60.

⁴³ See Smith, *The Family Code (Cont'd)*, 35 TEX. B.J. 1120, 1122 (1972), for a description of the proposed act.

⁴⁴ 405 U.S. 645 (1972).

declaring the children dependent, even though married fathers could not be deprived of their children without a showing that they were unfit parents. The United States Supreme Court held that presuming the unfitness of a father because he is not married to the child's mother, thus denying him a hearing on the issue of fitness, violates the due process clause. Perhaps more significantly, the Court concluded that "all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody" and, thus, "denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause."⁴⁵

The extension of constitutional protection to fathers of illegitimate children in dependency proceedings clearly applies to Texas, since this state presently makes no provision for notice to fathers of illegitimates in any instance.⁴⁶ Texas is probably alone among the states in denying absolutely a legal relationship between an illegitimate child and its father.⁴⁷

Stanley was followed by a per curiam reversal of a decision of the Supreme Court of Wisconsin which had held that the father of an illegitimate child is not entitled to notice of adoption proceedings.⁴⁸ The Wisconsin holding was based upon a statutory scheme quite similar to that in Texas, and it now seems clear that Texas courts must give notice to such fathers in both dependency and adoption proceedings.

The trend since the Supreme Court's landmark decisions in 1968⁴⁹ toward equating legitimate and illegitimate children in their relationship with their biological father is obvious. Texas will shortly feel the force of these holdings giving constitutional recognition to the fathers of illegitimate children.

Some evidence of this has already been presented in a case holding that a dependency decree entered without notice to a parent is void and cannot be given effect in a subsequent adoption suit.⁵⁰ The obvious effect of a holding that the father of an illegitimate child must be given notice in both dependency and adoption proceedings is to jeopardize the overwhelming majority of adoptions that have been granted in this state.⁵¹ Although such attacks will be infrequent, good practice obviously requires attorneys and judges to do all

⁴⁵ *Id.* at 658. An interesting contrast is presented by Texas' solicitude for fathers of legitimate children, who were held constitutionally entitled to notice of change-of-name suits. *Eschrich v. Williamson*, 475 S.W.2d 380 (Tex. Civ. App.—Beaumont 1972), *error ref. n.r.e.*

⁴⁶ *See* *Home of the Holy Infancy v. Kaska*, 397 S.W.2d 208 (Tex. 1965); *Gomez v. Perez*, 466 S.W.2d 41 (Tex. Civ. App.—San Antonio 1971), *error ref. n.r.e., rev'd*, 41 U.S.L.W. 4174 (U.S. Jan. 17, 1973); *cf* *C— v. W—*, 480 S.W.2d 474 (Tex. Civ. App.—Amarillo 1972) (father's contract to support illegitimate child is not enforceable as it was not supported by consideration; he had no legal obligation under Texas law, hence mother neither gave up right nor suffered detriment in exchange for his promise).

⁴⁷ H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 9-42 (1971).

⁴⁸ *Wisconsin v. Lutheran Social Serv.*, 47 Wis. 2d 420, 178 N.W.2d 56 (1970), *vacated sub nom. Rothstein v. Lutheran Social Serv.*, 405 U.S. 1051 (1972).

⁴⁹ *Glon v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968).

⁵⁰ *F— v. P—*, 479 S.W.2d 124 (Tex. Civ. App.—San Antonio 1971), *error ref. n.r.e.*

⁵¹ Although such adoptions are now clearly subject to attack on due process grounds by fathers of illegitimate children, a measure of comfort may be taken from the per curiam opinion in *Rothstein v. Lutheran Social Serv.*, 405 U.S. 1051 (1972), in which the Supreme Court indicated that on remand the lower courts should give consideration to the period of time that the adopted child had resided with its adoptive parents.

within their power to either secure consent to adoptions from fathers of illegitimates, or to give notice to these fathers.

The whole area of dependency suits obviously needs re-examination. Two cases from other jurisdictions have held that an indigent parent is entitled to counsel in dependency and neglect proceedings and that he must be advised of his right to counsel.⁵² Although there is some confusion among practitioners, a decree of dependency or neglect in Texas clearly does not terminate a parent's rights.⁵³ During the survey period it was held that a parent may bring suit to change custody against a custodian appointed by the dependency decree whether the custodian is the Department of Public Welfare,⁵⁴ a licensed child placement agency,⁵⁵ or adoptive parents.⁵⁶ The only solution to the problems raised by *Stanley* and these other cases is legislative action.

An unanswered question in Texas adoption law to this point has been whether the consent of a licensed adoption agency is required when the child has been relinquished to the agency for placement. This question has been resolved in favor of the agencies by the holding of a court of civil appeals that agency consent is a prerequisite to adoption of a child who has been relinquished by the mother to the agency.⁵⁷ In another important and controversial decision, imprisonment of a child's father in a penitentiary for commission of a felony was held to be "voluntary abandonment" under the adoption statute,⁵⁸ thus eliminating the need to obtain the father's consent for adoption of the child.⁵⁹

IV. FAMILY TORTS

Graham v. Franco,⁶⁰ discussed in the contexts of tort law and matrimonial property law elsewhere in this issue, was also a case of major significance in family law. Most significant was its holding that recovery for damages occasioned by the joint negligence of the plaintiff's spouse and a third party is the separate property of the injured spouse to the extent that it represents a recovery for injuries other than lost earning capacity and medical expenses. In *Graham* the Supreme Court of Texas removed a major obstacle to the ultimate abolition of the interspousal immunity doctrine, and perhaps, to the intra-family immunity doctrine altogether. In the last survey issue this writer noted the inroads already made on the parent-child immunity.⁶¹ *Graham*

⁵² *Cleaver v. Wilcox*, No. C71 1125 SAW (N.D. Cal. 1972); *In re B—*, 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972).

⁵³ See Smith, *Family Law, Annual Survey of Texas Law*, 21 Sw. L.J. 50, 51-55 (1967). But reopening of proceedings on petition of the mother where the child was declared dependent is subject to the discretion of the court. *Ex parte Gallop*, 486 S.W.2d 836 (Tex. Civ. App.—Beaumont 1972).

⁵⁴ *Shriner v. Simmons*, 483 S.W.2d 324 (Tex. Civ. App.—San Antonio 1972).

⁵⁵ *Reimer v. Lee & Beulah Moor Children's Home*, 473 S.W.2d 349 (Tex. Civ. App.—El Paso 1971), *error ref. n.r.e. per curiam*, 476 S.W.2d 665 (Tex. 1972).

⁵⁶ *Stewart v. Rouse*, 475 S.W.2d 574 (Tex. 1972).

⁵⁷ *Lutheran Social Serv., Inc. v. Farris*, 483 S.W.2d 693 (Tex. Civ. App.—Austin 1972), *error ref. n.r.e.*

⁵⁸ TEX. REV. CIV. STAT. ANN. art. 46a, § 6 (1969).

⁵⁹ *Hutson v. Haggard*, 475 S.W.2d 330 (Tex. Civ. App.—Beaumont 1971).

⁶⁰ 488 S.W.2d 390 (Tex. 1972).

⁶¹ Smith, *Family Law, Annual Survey of Texas Law*, 26 Sw. L.J. 51, 58 (1972). The trend apparently has continued, as the supreme court in *Schwing v. Bluebonnet Express*, 489

established that the negligence of a spouse will not be imputed to the other spouse, and that the community property defense is not available to a tortfeasor except with respect to a recovery for lost earning capacity and medical expenses. Thus, an injured spouse should now be allowed to sue the negligent spouse for damages to the extent that the recovery will be separate property, unless interspousal immunity bars such a suit.

Before this is done, however, the court should attempt a systematic answer to the following questions:

(1) May a third-party tortfeasor seek contribution from a negligent spouse under article 2212?⁶³ Generally, a right of contribution depends upon the right of the injured party to recover from the contributor.⁶⁴ If interspousal immunity is retained,⁶⁵ an injured spouse could not recover from the negligent spouse. Hence, this immunity would presumably extend to a suit by a third-party tortfeasor and foreclose any right on his part to receive contribution from the negligent spouse. Is it equitable under these circumstances for the negligent spouse to escape liability to a third-party tortfeasor upon the ground of "transferred" interspousal immunity?

(2) If interspousal immunity is abolished to the extent of recovery for that portion of the injuries that are separate, should it not also be abolished as to that portion of the injury that damaged the community? In *Graham* the supreme court said that the community property defense did not apply to those damages that are separate property, but did apply to those that are community property.⁶⁶ But is there any good reason for denying recovery for that portion of the damages which will be community property, *i.e.*, medical expenses and lost earning capacity? Would the husband actually receive a sufficient benefit from the wife's recovery to say that he "profits" from his own wrong by allowing her recovery for damages that are technically one-half his? Under the Family Code the spouse's powers of management and control of his or her portion of the community (including recovery for personal injuries) is almost complete.⁶⁷ Either spouse may sue without joinder of the other spouse,⁶⁷ may manage community property attributable to his or

S.W.2d 279 (Tex. 1973), *rev'g* 470 S.W.2d 133 (Tex. Civ. App.—Houston [14th Dist.] 1972), held that a child was not barred from recovery for the death of his mother because of the father's contributory negligence.

⁶³ TEX. REV. CIV. STAT. ANN. art. 2212 (1971).

⁶⁴ "The contribution defendant must be a tortfeasor, and originally liable to the plaintiff. If there was never any such liability, as where he has the defense of family immunity . . . then he is not liable for contribution." W. PROSSER, LAW OF TORTS 309 (4th ed. 1971).

⁶⁵ *McGlothlin v. McGlothlin*, 476 S.W.2d 333 (Tex. Civ. App.—San Antonio 1972), *error ref. n.r.e.*, disallowed a wife's action against her former husband for alienation of affection upon the ground, *inter alia*, that one spouse is not entitled to maintain a tort action against the other. *Id.* at 333-34.

⁶⁶ 488 S.W.2d at 397.

⁶⁷ See McKnight, *Recodification of Matrimonial Property Law*, 29 TEX. B.J. 1000 (1966).

⁶⁷ TEX. FAM. CODE ANN. tit. 1, § 4.04 (Supp. 1972); *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424 (Tex. 1971). See also *Jamail v. Thomas*, 481 S.W.2d 485 (Tex. Civ. App.—Houston [1st Dist.] 1972), *error ref. n.r.e.* (husband cannot assign part of wife's interest in cause of action arising from negligence, as wife is given sole management of any damages recovered). The wife's emancipation was effective Jan. 1, 1968, at which time limitations commenced on suits by her. *Kirkpatrick v. Hurst*, 484 S.W.2d 587 (Tex. 1972).

her efforts without the interference of the other spouse,⁶⁸ and may preserve this property intact from the claims of the other spouse's creditors.⁶⁹ A spouse's community property interest in the other spouse's recovery for personal injury is, therefore, to some extent ephemeral. Having no power to exert control over this property, his or her interest is little more than an expectancy, extending only to a right to prevent the other spouse's disposition of their property in actual or constructive fraud.⁷⁰ The problem is that all community property is available to satisfy tort claims against a spouse, even though the community property is subject to the exclusive management, control, and disposition of the other spouse.⁷¹ Thus, any recovery for lost earning capacity and medical expenses would be available to satisfy the claim of the injured spouse, diminishing to that extent the liability of the other spouse.

(3) The torts for protection of the marital status will deserve close attention. The Supreme Court of Texas has pending before it a decision holding that an action for criminal conversation lies against a third party committing adultery with the plaintiff's spouse.⁷² Aside from the fact that the action for criminal conversation has been abolished in many jurisdictions,⁷³ upon what basis can the court distinguish an action for criminal conversation from an action for alienation of affection? *Graham* contains an italicized passage⁷⁴ which indicates that the supreme court may consider adultery an injury to the person of the adulterous spouse rather than an injury to the relationship of husband and wife, particularly when the husband and wife are still married. But in what significant respect does alienation of affection differ? The gravamen of alienation of affection is that the third-party defendant has alienated the affections of the spouse.⁷⁵ Would alienation of affection exist if there had been no divorce? Insofar as the elements of the cause of action are concerned, it rather clearly would. Proof that a divorce resulted from either alienation of affection or criminal conversation would go only to the issue of damages, not to the existence of the cause of action. However, if the action is to be allowed against a third party, logically recovery against a spouse in complicity with a third party should also be allowed. But again, a recovery against a spouse would be payable from community property, and the injury to the plaintiff-spouse would be separate property. To the extent that the recovery is payable from the community estate, the recovering spouse's interest could be said to be reduced by one-half. Thus, it is apparent that *Graham* leaves many unanswered questions.

⁶⁸ TEX. FAM. CODE ANN. tit. 1, § 5.22 (Supp. 1972); *Jamail v. Thomas*, 481 S.W.2d 485 (Tex. Civ. App.—Houston [1st Dist.] 1972).

⁶⁹ TEX. FAM. CODE ANN. tit. 1, § 5.61 (Supp. 1972).

⁷⁰ Quilliam, *Gratuitous Transfers of Community Property to Third Persons*, 2 TEX. TECH. L. REV. 23 (1970).

⁷¹ TEX. FAM. CODE ANN. tit. 1, § 5.61(b) (Supp. 1972); *Jamail v. Thomas*, 481 S.W.2d 485 (Tex. Civ. App.—Houston [1st Dist.] 1972).

⁷² *McMillan v. Felsenthal*, 482 S.W.2d 9 (Tex. Civ. App.—Tyler 1972), *error granted*.

⁷³ W. PROSSER, *supra* note 63, at 875-77, 887-88.

⁷⁴ 488 S.W.2d at 393.

⁷⁵ W. PROSSER, *supra* note 63, at 876. See also *McGlothlin v. McGlothlin*, 476 S.W.2d 333 (Tex. Civ. App.—San Antonio 1972), *error ref. n.r.e.*